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**SHEPPARD MULLIN**  
SHEPPARD MULLIN RICHTER & HAMPTON LLP  
ATTORNEYS AT LAW

1300 I Street, NW | 11th Floor East | Washington, D.C. 20005-3314  
202-218-0000 office | 202-218-0020 fax | www.sheppardmullin.com

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May 29, 2007

VIA HAND DELIVERY

Peter H. Doyle, Esq.  
Chief, Audio Division  
Media Bureau  
Federal Communications Commission  
236 Massachusetts Avenue, NE  
Suite 110  
Washington, DC 20002

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AUG - 9 2007

Federal Communications Commission  
Office of the Secretary

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MAY 29 2007

Federal Communications Commission  
Bureau / Office

Re: Noncommercial Educational FM Application Filing Window

Dear Mr. Doyle:

By its attorneys, Native Public Media ("NPM") respectfully submits this letter regarding the October 2007 noncommercial educational ("NCE") construction permit application window recently announced by the Federal Communications Commission ("FCC" or "Commission").<sup>1</sup> NPM urges the Commission to revise its rules and policies to ensure that applicants on Native American tribal lands are on equal footing during the upcoming NCE window. NPM is principally concerned about three issues: (i) adoption of a numerical limit on the applications a single entity can file; (ii) informing and educating potential tribal applicants about application processes and regulatory requirements relating to the upcoming window and other station ownership opportunities; and (iii) the establishment of a point for tribal applicants in the point system selection process.

*Background.* NPM represents the interests of 33 public radio stations serving Native nations and communities throughout the United States.<sup>2</sup> Since its launch in 2004, NPM's primary focus has been strengthening existing Native American public radio stations and promoting ownership for more Native communities by serving as an

<sup>1</sup> *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, DA No. 07-1613 (April 4, 2007).

<sup>2</sup> NPM, formerly known as the "Center for Native American Public Radio," was created as a center under the National Federation of Community Broadcasters with seed funding from the Corporation for Public Broadcasting ("CPB"). A list of the NPM member stations can be found at Appendix A, attached hereto.

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advocate, national coordinator, and resource center. NPM recognizes that profound changes are taking place in the way Americans consume media, and is therefore focused not only on the needs of Native American radio stations, but also on helping Native America leverage new digital and wireless platforms that will make it possible to close the existing media divide. Ensuring that policymakers understand the impact of their actions on Indian Country is critical to NPM's efforts in this regard.<sup>3</sup>

*Application Limits.* NPM supports the adoption of a limit on the number of applications a single entity can file during the upcoming NCE window. Absent limitations, NPM anticipates that the Commission will face an avalanche of applications. Limiting the number of applications that can be filed will encourage serious applicants to perform the appropriate due diligence for a few carefully selected sites and will prevent "mass" application filings by parties that do not have a sincere interest in actually constructing and operating stations. Even if only a handful of filers engage in mass application filings, such filers could disrupt the application process and delay the provision of NCE service, thereby harming the public interest. Among other things, mass filings can result in long daisy chains of mutually exclusive applications which can take years to resolve. By preventing mass filings, the Commission can reduce the administrative burdens it will face and significantly expedite the provision of new radio service to the public.

NPM notes that the Commission and its staff have previously imposed limits on the number of applications that could be filed in connection with other filing windows.<sup>4</sup>

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<sup>3</sup> NPM was honored to serve as a co-host of the Commission's Indian Telecommunications Initiative ("ITI") Regional Workshop and Roundtable held in summer 2006 in San Diego, which, for the first time, included a broadcast component. NPM appreciates the efforts of FCC Commissioners and staff who participated in and coordinated the event.

<sup>4</sup> See, e.g., *Limited Low Power Television/Television Translator Filing Window From April 11, 1994 Through April 15, 1994*, 58 FR 11069-01, 1994 WL 68601 (Mar. 9, 1994); *Low Power Television and Television Translator Filing Window From February 10, 1992 Through February 14, 1992*, 56 FR 65258-02, 1991 WL 26305 (Dec. 16, 1991); *Low Power Television and Television Translator Filing Window From March 29, Through April 2, 1993*, 58 FR 8956-02 (Feb. 18, 1993); *Low Power Television and Television Translator Filing Window From April 29, 1991, Through May 3, 1991*, 56 FR 11556-01 (Mar. 19, 1991); *Low Power Television and Television Translator Filing Window From December 4, 1989 Through December 8, 1989*, 54 FR 46298-03 (Nov. 2, 1989); *Low Power Television and Television Translator Filing Window From March 6, 1989 Through March 10, 1989*, 54 FR 4906-01 (Jan. 31, 1989); *Low Power Television and Television Translator Filing Window From June 15, 1988 Through June 24, 1988*, 53 FR 17048-02 (May 13, 1988); *Low Power Television and Television Translator Filing Window From June 22 Through July 2, 1987*, 52 FR 18953-01 (May 20, 1987). In all of these instances, the Commission specified that "[n]o more than five (5) applications for new low power television or television translator stations may be tendered for filing by any applicant, or by any individual or entity having an interest of one percent (1%) or greater in any applicant(s)" filing in the window at issue. The restrictions did not apply to major change applications.

Limits also are appropriately imposed for the upcoming NCE window, the first such window in many years. Recently, the National Federation of Community Broadcasters ("NFCB") and other organizations filed a letter urging the FCC staff to establish a limit of no more than ten (10) applications to be filed by any single applicant.<sup>5</sup> As explained in the NFCB letter, the Commission has delegated to its staff the authority to implement NCE filing windows, including limits on the number of filings per applicant during a particular period.<sup>6</sup> NPM agrees with NFCB.

*Unique Issues Facing Tribal Applicants.* NPM anticipates that several federally recognized Native nations will participate in the upcoming NCE window. While many of these applicants will be new to the FCC licensing process, NPM anticipates that it can serve as a clearinghouse for the flow of information and expertise from existing tribal licensees to first-time applicants for broadcast stations on tribal lands. Although NPM can assist prospective permittees by providing information and education on the application process, NPM's efforts alone will not overcome certain inherent disparities that are tilting the playing field against tribal applicants.

The Commission and its staff can, however, take steps today that will help level the playing field for tribes that want to establish stations to offer a local voice that will reflect that tribe's unique traditions, language, values, and history. Since the founding of the United States, the federal government has maintained a unique government-to-government and trust relationship with federally-recognized Native nations, a relationship acknowledged by the Commission's *Tribal Policy Statement*.<sup>7</sup> Commission policy recognizes "the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership."<sup>8</sup> NPM firmly believes that the ability to broadcast within their own communities greatly supports the self-government, economic development, and nation-building objectives of Native nations. Native nations, as sovereign governments engaged in the exercise of modern self-determination, are responsible for the health, safety, and welfare of their citizens. They are responsible for policing and securing the homeland within their borders, including several regions spanning international borders; maintaining and sustaining their sacred histories, languages, and traditions; and establishing and fostering healthy economies.

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<sup>5</sup> See Letter from John Crigler, Garvey Schubert Barer, on behalf of Station Resource Group, National Federation of Community Broadcasters, Public Radio Capital, Pacifica Foundation, Prometheus Radio Project, Office of Communication of the United Church of Christ, Public Radio International, California Public Radio, Western States Public Radio, College Broadcasters, Inc., Eastern Region Public Media, to Peter H. Doyle, Chief, Audio Division, FCC, dated April 4, 2007.

<sup>6</sup> *Id.* (citing *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7422 (2000)).

<sup>7</sup> *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078, 4081 (2000).

<sup>8</sup> *Id.*

NPM requests that Commission staff initiate an Indian Telecommunications Initiatives ("ITI") event or series of events focused on educating tribes about participating in the October NCE window and/or otherwise entering the broadcast marketplace. ITI activities take many forms, including interactive regional workshops,<sup>9</sup> outreach by senior FCC officials and staff,<sup>10</sup> one-on-one meetings,<sup>11</sup> and educational materials.<sup>12</sup> Although the ITI has historically been focused primarily on enhancing "telecommunications" infrastructure, it also has served as a resource for tribes with an interest in other services regulated by the FCC, including television and radio broadcast services.<sup>13</sup> NPM urges the Commission to arrange additional regional workshops this summer to ensure that tribes are fully informed about the opportunities ahead, and are well-educated about the application and selection processes. NPM anticipates that holding such events in one or more cities with close proximity to many Native nations, such as Phoenix, AZ, Denver, CO, or Albuquerque, NM, will allow the maximum number of potential tribal applicants

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<sup>9</sup> See FCC Website, *Indian Telecommunications Initiatives Page*, <http://www.fcc.gov/indians/iti.html> (viewed May 24, 2007) ("The FCC offers interactive regional workshops to provide "how to" information about telecommunications services and telecommunications infrastructure development. Workshop participants include tribal, federal agency, and communications industry representatives. The workshops address telecommunications issues facing Indian Country with the goal of providing clear, practical information tribes can use to gain access to critical telecommunications services. Regional workshops acknowledge different tribes are at different stages of economic development, and their experiences with telecommunications deployment vary.").

<sup>10</sup> *Id.* ("Senior FCC officials and staff attend and participate in conferences, meetings, and other events sponsored by American Indian tribes, tribal organizations, and others interested in Indian Country issues. These outreach activities provide the FCC with an opportunity to establish beneficial relationships with tribal governments, organizations and their members, and to listen and learn about the telecommunications needs of these constituencies. They also provide an opportunity for the FCC to distribute information about rules and policies affecting telecommunications services in Indian Country.").

<sup>11</sup> *Id.* ("FCC staff are available to meet with individual tribes to address their unique telecommunications issues. Meetings provide a forum for an individual tribe to explore FCC rules and programs affecting the provision of telecommunications services to its members.")

<sup>12</sup> *Id.* ("The FCC distributes educational materials to tribes and tribal organizations about issues of interest, including Universal Service Low-Income programs like enhanced Lifeline and Link-Up.")

<sup>13</sup> See, e.g., *FCC to Hold Indian Telecommunications Initiatives Regional Workshop and Roundtable in San Diego, CA, on July 27-28, 2006*, News Release (rel. July 21, 2006). At this ITI event, programs included "Broadcast Radio in Indian Country," which discussed "[b]roadcast radio policy, the acquisition of spectrum and issues arising in developing and operating broadcast radio outlets in Indian Country" and "Tribal Television Development" which featured a "[t]elevision regulatory overview" and discussion of "acquisition of spectrum, and issues encountered in the development of tribal television outlets." Senior officials and staff from the Office of Intergovernmental Affairs, the Audio Division of the Media Bureau, and the Consumer and Governmental Affairs Bureau were present.

to attend. Moreover, NPM urges the Commission to develop educational materials, such as brochures and handbooks that could be distributed both in print and electronically, that would educate tribes about the regulatory aspects of ownership and operation of radio and television broadcast stations.

NPM also notes that it has requested the Commission to revise its current NCE application and selection rules in a manner that better reflects the unique government-to-government relationship between tribes and the United States and effectuates the intent of the *Tribal Policy Statement*. The proposal would make a significant difference in tribes' access to spectrum in the upcoming NCE window. Specifically, NPM has proposed that the Commission revise its point system selection rules<sup>14</sup> to include the award of a single point for applicants that are federally recognized tribes.<sup>15</sup> The establishment of such a point would be a step towards acknowledging tribal sovereignty, and would promote longstanding Commission policy goals in the provision of broadcast service, including competition, localism, and diversity.<sup>16</sup> There are no statutory, constitutional, or public policy reasons that the Commission could not establish such a point for tribal applicants.<sup>17</sup>

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<sup>14</sup> 47 C.F.R. § 73.7003; see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Notice of Proposed Rulemaking, 10 FCC Rcd 2877 (1995), *further rules proposed*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21167 (1998), *rules adopted*, Report and Order, 15 FCC Rcd 7386 (2000), *vacated in part on other grounds sub nom.*, *National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) *clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074, *Erratum*, 16 FCC Rcd 10549, *recon. denied*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002), *aff'd sub nom. American Family Ass'n v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 634 (2004) (history pertaining only to non-reserved band FM channels omitted).

<sup>15</sup> See Reply Comments of Native Public Media in MB Docket No. 06-121, 2006 *Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996* (filed January 16, 2007) at 10, n. 14 (“Before it accepts applications for a future NCE window, the Commission should request public comment on and evaluate whether to amend Section 73.7003 of its rules, 47 C.F.R. § 73.7003, to include the award of one point for applicants that are federally recognized tribes.”).


<sup>16</sup> *Id.* at 4-10 (discussing Native nations' contributions to competition, diversity, and localism among media outlets).

<sup>17</sup> The constitutionality of policies that recognize tribal sovereignty is beyond question. Indeed, the Commission has specifically stated that rules and policies governing tribal ownership of Title III licenses are not affected by *Adarand Constructors v. Peña*, 115 S.Ct. 2097 (1995). See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding, Amendment of The Commission's Cellular PCS Cross-Ownership Rule, Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 11 FCC Rcd 136 (1995) (exemptions and exceptions from affiliation rules for applicants affiliated with Indian tribes and Alaska Regional or Village Corporations were different from exceptions affecting minority investors because they are premised on tribes' unique legal status as recognized in the “Indian Commerce Clause” of the United States Constitution).

The proposals discussed above will meet multiple public interest goals. A limit on applications will expedite the provision of new FM service to the listening public across the nation. Changes to the Commission's point system will effectuate the unique government-to-government relationship between Native nations and the United States, and will promote competition, diversity, and localism by leveling the playing field for tribal applicants. Improving awareness of the Commission's application processes by potential tribal applicants will encourage tribal participation and preparedness for the upcoming NCE window. Accordingly, NPM urges the Commission and its staff to adopt these proposals in time for the October 2007 NCE window.

Respectfully submitted,

NATIVE PUBLIC MEDIA

By   
Erin L. Dozier, Esq.  
*Counsel to Native Public Media*

cc: Monica Desai, Chief, Media Bureau  
Shana Barehand, Tribal Liaison, Office of Intergovernmental Affairs

**Appendix A**

**Native Public Media Member Stations**

KABR(AM), Alamo Community, NM, The Alamo Navajo School Board  
KABU(FM), Fort Totten, ND, Dakota Circle Tipi, Inc.  
KBRW(AM), Barrow, AK, Silakkuagvik Communications, Inc.  
KCIE(FM), Dulce, NM, Jicarilla Apache Tribe  
KCUK(FM), Chevak, AK, Kashunamiut School District  
KCUW-LP, Pendleton, OR, Confederated Tribes of the Umatilla Indian Reservation  
KEYA(FM), Belcourt, ND, KEYA, Inc.  
KGHR(FM), Tuba City, AZ, Tuba City High School Board, Inc.  
KGVA(FM), Fort Belknap, Agency, MT, Fort Belknap College  
KIDE(FM), Hoopa, CA, Hoopa Valley Tribe  
KILI(FM), Porcupine, SD, Lakota Communications, Inc.  
KIYU(AM), Galena, AK, Big River Public Broadcasting Corp.  
KLND(FM), Little Eagle, SD, Seventh Generation Media Services, Inc.  
KMHA(FM), Four Bears, ND, Fort Berthold Communications Enterprises  
KNBA(FM), Anchorage, AK, Koahnic Broadcast Corporation  
KNNB(FM), Whiteriver, AZ, Apache Radio Broadcasting Corporation  
KNSA(AM), Unalakleet, AK, Unalakleet Broadcasting, Inc.  
KOHN(FM), Sells, AZ, Tohono O'odham Nation  
KOTZ(AM), Kotzebue, AK, Kotzebue Broadcasting, Inc.  
KPYT-LP, Tucson, AZ, Pascua Yaqui Tribe, a Federally Recognized Indian Tribe  
KRMH(FM), Red Mesa, AZ, Red Mesa Unified School District No. 27  
KSDP(AM), Sand Point, AK, Aleutian Peninsula Broadcasting, Inc.  
KSHI(FM), Zuni, NM, Zuni Communications Authority  
KTDB(FM), Ramah, NM, Ramah Navajo School Board, Inc.  
KUHB-FM, St. Paul, AK, Pribilof School District Board of Education  
KUTE(FM), Ignacio, CO, KUTE, Inc.  
KUYI(FM), Hotevilla, AZ, The Hopi Foundation  
KWRR(FM), Ethete, WY, Business Council of the Northern Arapaho Tribe  
KWSO(FM), Warm Springs, OR, Confederated Tribes Warm Springs Reservation  
KYNR(AM), Toppenish, WA, Confederated Tribes and Bands of the Yakima Nation  
KYUK(AM), Bethel, AK, Bethel Broadcasting, Inc.  
KZPA(AM), Fort Yukon, AK, Gwandak Public Broadcasting, Inc.  
WOJB(FM), Reserve, WI, Lac Courte Oreilles Ojibwa Public